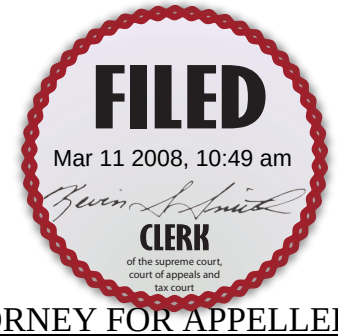

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IN THE COURT OF APPEALS OF INDIANA

BRIAN WUEST,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 84A01-0708-JV-367
	)	
DAWN M. DICKERSON,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable David R. Bolk, Judge and
The Honorable R. Paulette Stagg, Magistrate Presiding
Cause No. 84C01-0111-JP-1002

March 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian Wuest appeals the trial court's denial of his petition for modification of child custody. Wuest raises the following restated issues:

1. Did the trial court properly deny Wuest's request for a hearing before the regular Vigo County Circuit Court judge rather than the magistrate judge?

2. Did the trial court properly deny Wuest's petition for modification of child custody?

We affirm.

On October 27, 2001, Dawn Taylor gave birth to B.W. On November 9, 2001, Taylor filed a petition to establish paternity in the Vigo County Circuit Court in which she alleged that Wuest was B.W.'s father. This allegation was later confirmed by a paternity test. A custody order was entered on December 11, 2002. The order awarded physical custody of B.W. to Taylor, granted Wuest parenting time in accordance with the Indiana Parenting Time Guidelines, and ordered Wuest to pay child support.

At all relevant times, Taylor lived in West Terre Haute, Indiana, while Wuest lived in Greenwood, Indiana. In 2003 and 2004, Wuest had parenting time with B.W. from Thursday evening through Sunday evening each week and had extended visitation with him during the summer. The trial court found that in 2004, Wuest and Taylor agreed that Wuest should have parenting time in excess of the standard established in the parenting time guidelines.

In late summer 2005, Taylor enrolled B.W. in Vigo County's Head Start program. Unbeknownst to Taylor, Wuest had already enrolled B.W. in a preschool program in Greenwood. Wuest and Taylor discussed the situation and agreed that B.W. would attend preschool in Greenwood but would enter kindergarten in 2007 in Vigo County. During

the 2005-2006 school year, Wuest had parenting time with B.W. from Sunday through Thursday each week. In the fall of 2006, B.W. again attended preschool in Greenwood, and Wuest had parenting time with him from Sunday through Thursday each week.

On November 21, 2006, Wuest filed a petition seeking modification of custody and of his child support obligation. Wuest alleged that there had been a substantial change in circumstances since the original custody order was entered in 2002 and that he should be awarded primary physical custody of B.W. On February 21, 2007, Wuest filed a motion requesting that the regular Vigo County Circuit Court judge, rather than the magistrate judge, conduct the hearing on his petition for modification of child custody. That motion was denied on March 26, 2007.

The trial court held a hearing on Wuest's petition for modification of child custody on May 21, 2007. During the hearing, contradictory evidence was introduced regarding the total amount of time B.W. resided with each parent between 2003 and 2006. Taylor and Wuest both alleged that between 2003 and 2006 they had custody of B.W. more than fifty percent of the time.

Wuest testified that he currently resided in Greenwood with his wife, a son who is younger than B.W., and his two children from a previous marriage that are older than B.W. and who visit every weekend. Wuest indicated that he had stable employment and earned approximately $72,000 per year. Wuest stated that he had moved five times since 2001 and that he had filed for bankruptcy in either 2003 or 2004. Wuest testified that he was involved in B.W.'s preschool and with B.W.'s social activities, which included

gymnastics and baseball. Wuest believed that Taylor had attended two of B.W.'s gymnastics programs and some of his baseball games.

Taylor testified that she currently resided in West Terre Haute with her husband, her two children from a previous marriage who are older than B.W., and her son with her current husband who is younger than B.W. She indicated that she had not been employed since before B.W.'s birth and relied on her husband for support. Since 2003, Taylor stated that she had moved six times, each move within Vigo County. Because of these moves, Taylor's two older children had been enrolled in five different schools since 2004. Taylor noted that her gas had been turned off on two separate occasions because of non-payment. The first occasion occurred in September 2004, and the gas was turned off for approximately one week. The second occasion was in October 2006, and the gas was turned off for two days.

On July 9, 2007, the trial court issued an order denying Wuest's petition for modification of child custody. With regard to Taylor's six moves and her older children being enrolled in five different schools since 2004, the trial court noted that Wuest had not introduced any evidence showing how this had adversely impacted Taylor's children. The trial court also stated:

> [T]he parties had previously agreed that [B.W.] could spend considerable parenting time with his father until the child became kindergarten age. [Wuest] has, because of his love for his son, simply changed his mind and wishes to have custody of the child. By bootstrapping mother's agreement for father to have more than the guidelines' minimum parenting time, [Wuest] attempts to portray a picture of substantial change interspersed with events in [Taylor's] life which [Wuest] describes as instability. In point of fact, there are no substantial changes in circumstance which warrant a change in custody.

Appellant's Appendix at 9 (emphasis in original). Wuest now appeals.

1.

Wuest argues that the trial court erred in denying his motion to have the hearing on his petition for modification of child custody conducted by the regular Vigo County Circuit Court judge rather than the magistrate judge. He first contends that he had a right under article 1, section 7 of the Indiana Constitution to have his case heard by the regular circuit court judge. This argument, however, is waived because Wuest raised it for the first time in his reply brief. *See Naville v. Naville*, 818 N.E.2d 552, 553 n. 1 (Ind. Ct. App. 2004) ("[a] party may not raise an argument for the first time in its reply brief"); *see also* Ind. Appellate Rule 46(C) ("[n]o new issues shall be raised in the reply brief").

Wuest next argues that under Indiana Trial Rule 53(B), his case could not be referred to the magistrate judge unless all of the parties agreed to this before trial. Wuest points out that he did not agree to the case being referred to the magistrate judge and that he specifically objected to this on February 21, 2007 when he filed a motion requesting that the regular circuit court judge conduct the hearing on his petition for modification of custody.

"T.R. 53 is entitled 'Masters' and pertains only to proceedings conducted before a master." *Clark v. Gossett*, 656 N.E.2d 550, 552 (Ind. Ct. App. 1995). The nature of a master's duties and function are delineated in T.R. 53(B), which states:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in action to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only

> upon a showing that some exceptional condition requires it. Reference shall be allowed when the parties agree prior to trial as provided by these rules or by statute.

T.R. 53(C) further explains:

> The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearing and for the filing of the master's report.

"These provisions reflect that a master, as contemplated in T.R. 53, is specially appointed for a particular purpose in a specific case, with powers to be designated by the appointing court." *Clark v. Gossett*, 656 N.E.2d at 552.

The argument raised by Wuest here is similar to the one made by the appellant in *Clark*. In that case, a paternity hearing was conducted before a commissioner. Appellant argued that the trial court erred by not following the provisions of T.R. 53 pertaining to proceedings conducted before master commissioners. We noted that the commissioner had been appointed by the Delaware Superior Court to preside over all cases involving Title IV of the Federal Social Security Act, including paternity disputes, that the commissioner's powers with regard to these cases had not been limited, and that the commissioner was appointed for a term of one year, not merely one case. *Id.* Based on this, we concluded that the commissioner was not a "master" within the meaning of T.R. 53, and therefore, T.R. 53 did not apply in that case. *Id.*

Here, the magistrate judge who presided at the hearing was appointed by the Vigo County Circuit Court judge to preside over all juvenile cases, not just this specific case, and her power to preside over juvenile cases was not limited. The magistrate judge here

was not a "master" within the meaning of T.R. 53. Therefore, T.R. 53 does not apply in this case.

Next, relying on Ind. Code Ann. § 33-33-49-32 (West, PREMISE through 2007 1st Regular Sess.), Wuest asserts "[i]t is well-settled that where a party requests an elected judge to preside over a proceeding instead of a master commissioner, that request shall be granted." *Appellant's Brief* at 13. I.C. § 33-33-49-32(c) provides:

> A party to a superior court proceeding that has been assigned to a magistrate appointed under this section may request that an elected judge of the superior court preside over the proceeding instead of the magistrate to whom the proceeding has been assigned.
>
> ***
>
> Upon a timely request made under this subsection by either party, the magistrate to whom the proceeding has been assigned shall transfer the proceeding back to the superior court judge.

This statute only applies to cases filed in Marion County. Because this case was filed in Vigo County, I.C. § 33-33-49-32 does not apply here.

Ind. Code Ann. § 31-31-3-2 (West, PREMISE through 2007 1st Regular Sess.), provides that the judge of a juvenile court may appoint one or more full-time magistrates. The magistrate judge who presided over this case was properly appointed pursuant to I.C. § 31-31-3-2. Vigo County does not have a statute comparable to I.C. § 33-33-49-32 that would have allowed Wuest to request as a matter of right that the hearing on his petition to modify custody be heard by the regular circuit court judge. Based on this, we cannot say the trial court erred in denying Wuest's motion to have the hearing on his petition for modification of child custody conducted by the regular Vigo County Circuit Court judge rather than the magistrate judge.

2.

Wuest argues that the trial court abused its discretion when it denied his petition for modification of custody. We review custody modifications for an abuse of discretion. *Webb v. Webb*, 868 N.E.2d 589 (Ind. Ct. App. 2007). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. *Id.* In reviewing a trial court's determination, we do not reweigh the evidence or judge the credibility of the witnesses. *Rea v. Shroyer*, 797 N.E.2d 1178 (Ind. Ct. App. 2003). We will only consider the evidence most favorable to the judgment and any reasonable inferences from that evidence. *Id.*

Wuest is appealing from a decision in which the trial court entered findings of fact and conclusions of law at Wuest's request pursuant to Indiana Trial Rule 52. In this situation, we first determine whether the evidence supports the findings and then assess whether the findings support the judgment. *Truelove v. Truelove*, 855 N.E.2d 311 (Ind. Ct. App. 2006). We will set aside the findings or the judgment only if they are clearly erroneous. *Id.* Findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. *Id.* The trial court's judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.*

As the petitioner seeking subsequent modification of custody, Wuest bears the burden of demonstrating that the existing custody arrangement should be altered. *Webb v. Webb*, 868 N.E.2d 589. Modifications of custody subsequent to a paternity

determination are made according to Ind. Code Ann. § 31-14-13-6 (West, PREMISE through 2007 1st Regular Sess.), which provides:

> The court may not modify a child custody order unless:
> (1) modification is in the best interests of the child; and
> (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 2 and, if applicable, section 2.5 of this chapter.

Section 2 of that chapter provides:

> The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:
> (1) The age and sex of the child.
> (2) The wishes of the child's parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parents;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's best interest.
> (5) The child's adjustment to home, school, and community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

I.C. § 31-14-13-2.

Wuest contends that there was a substantial change in several of the factors listed in Section 2, and because of this, the trial court should have granted his petition to modify custody. He first notes that there has been a substantial change in B.W.'s age and his developmental needs. At the time the original custody order was entered in December of 2002, B.W. was a little over one year old. At the May 21, 2007 hearing, B.W. was nearly

six years old. With his increased age, Wuest points out that B.W. now has educational and social needs. We have previously pointed out, though, that the fact that a child has grown older "does not in itself constitute a substantial change in circumstances. If it did, every custody order would be subject to automatic modification as a child grows older." *Bryant v. Bryant*, 693 N.E.2d 976, 978 (Ind. Ct. App. 1998), *trans. denied*. Wuest introduced evidence showing that he was meeting B.W.'s developmental needs by enrolling him in preschool and having him participate in baseball and gymnastics. Wuest, however, has not shown that Taylor is not currently satisfying or is incapable of satisfying B.W.'s developmental needs. Taylor was not actively involved in B.W.'s preschool, but she did attend two of B.W.'s gymnastics programs and some of his baseball games in Greenwood despite the fact that she lived nearly one hundred miles away in West Terre Haute. We cannot say that the trial court abused its discretion in not finding that the change in B.W.'s age and developmental needs was a substantial change warranting modification of custody.

Wuest next contends that the trial court should have granted his petition to modify custody because he has become B.W.'s primary caretaker. Wuest's argument is principally based on evidence he introduced that showed that from as early as 2003, B.W. was in his care more than fifty percent of the time. Taylor, though, introduced evidence that showed that since the entry of the original custody order in December of 2002, she had custody of B.W. more than fifty percent of the time. With regard to this issue, the trial court found that "[t]he parties each made much of which one had the child the greater amount of time although it was, in fact, substantially a shared arrangement."

Appellant's Appendix at 9. Wuest essentially asks us to reweigh the evidence, find that he was B.W.'s primary caretaker, and conclude that this was a substantial change warranting modification of custody. We will not reweigh the evidence. *Rea v. Shroyer*, 797 N.E.2d 1178. Given the contradictory evidence introduced regarding the amount of time B.W. was in the custody of Wuest and Taylor, we cannot say the trial court abused its discretion in concluding that this was not a substantial change in circumstances justifying modification of custody.[1]

Wuest argues that the lack of stability in Taylor's life constitutes a substantial change requiring modification of custody. We have previously noted that "[c]ontinuity and stability in the life of a child is an important component in determining the proper

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[1] Wuest also contends that because of the amount of time B.W. was in his custody, he is B.W.'s de facto custodian. The term "de facto custodian" means:

> [A] person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:
>
> (1) six (6) months if the child is less than three (3) years of age; or
>
> (2) one (1) year if the child is at least three (3) years of age.

Ind. Code Ann. § 31-9-2-23.5 (West, PREMISE through 2007 1st Regular Sess.). We have already noted that contradictory evidence was introduced at trial regarding the amount of time B.W. was in Wuest's custody. Thus, it is not clear that Wuest was B.W.'s primary caregiver.

Furthermore, we have previously noted:

> In 1999, however, the legislature amended the statutes governing certain custody proceedings to allow "de facto" custodians to be parties in such proceedings. *In re L.L. & J.L.*, 745 N.E.2d 222, 229 (Ind. Ct. App. 2001), *trans. denied*. We have previously concluded that these amendments were intended "to clarify that a third party may have standing in certain custody proceedings, and that it may be in a child's best interests to be placed in that party's custody." *Id.* at 230.

Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003). De facto custodians, then, are third parties who may be caring for a child. Because Wuest is B.W.'s natural parent and not a third party, he is not B.W.'s de facto custodian. Therefore, this argument does not advance Wuest's claim that the trial court erred in denying his petition to modify custody.

custodial arrangement for a child." *In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1210 (Ind. Ct. App. 2002).

Wuest first points out that since 2003 Taylor has moved six times and that this has caused her two older children to be enrolled in five different schools since 2004. The frequency with which Taylor changed her residence certainly gives cause for concern about her ability to provide B.W. with a stable home life. But, we have noted that "[a] reasonable frequency of changes of residence cannot by itself be regarded as detrimental . . . ." *Winderlich v. Mace*, 616 N.E.2d 1057, 1060 (Ind. Ct. App. 1998) (concluding that the fact that mother lived in three different locations in the four years between the divorce and the modification hearing was not evidence of detriment to the children's welfare in her custody). Here, the trial court took note of Taylor's six moves, but found that Wuest had not introduced any evidence showing how the changes in residence and schools had adversely impacted Taylor's two older children. The trial court also took note of the reasons for some of Taylor's moves. In one case, Taylor moved because she needed a larger house to accommodate her growing family, in another case she moved to get her children out of a bad neighborhood, and in a third instance she moved because of a fire. Taylor's changes of residence, then, were often for her children's benefit. Like Taylor, Wuest has also changed his residence with some frequency. He testified that since 2001, he has moved five times. Based on this evidence, we cannot say the trial court erred in not finding that Taylor's change in residences was a substantial change warranting modification of custody.

Wuest further notes that Taylor has had some financial instability. He points to the fact that her gas was turned off on two separate occasions because she did not pay her bills. Taylor's gas was first turned off in September 2004 for a week and was next turned off in October 2006 for two days. These instances are cause for concern, but in both cases the gas was only turned off for a relatively short period of time. Wuest also suffered from financial instability. He testified that he filed for bankruptcy in 2003 or 2004. Taylor's financial instability was not so substantial a change that it warranted modification of custody.

We commend Wuest for his interest in B.W.'s welfare. Nevertheless, we conclude that the trial court did not abuse its discretion in concluding that Wuest did not prove a substantial change that would have warranted modification of custody.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.